No. 92-1403

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDAR VALLEY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner was not entitled to abrogate collective bargaining agreements with unions in one geographic area because its employees in another geographic area had previously voted to decertify sister locals of those unions, or because of the alleged loss of bargaining authority of the multiemployer association that had negotiated the agreements.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Building & Construction Trades Council v. *Associated Builders & Contractors*, No. 91-261 (Mar. 8, 1993)	9
IBEW, Local 532 (Brink Constr. Co.), 291 N.L.R.B. 437 (1988)	4-5
John Deklewa & Sons, Inc., 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge & Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988)	4, 8
Litton Financial Printing Div. v. *NLRB*, 111 S. Ct. 2215 2215 (1991)	13-14
Jim McNeff, Inc. v. *Todd*, 461 U.S. 260 (1983)	9
NLRB v. *Local Union No. 103, Int'l Ass'n of Bridge & Iron Workers* 434 U.S. 335 (1978)	9
Nordpal Corp., 297 N.L.R.B. 119 (1989)	4
Reliable Electric Co., 286 N.L.R.B. 834 (1987)	5
W.B. Skinner, Inc., 283 N.L.R.B. 989 (1987)	4
Ward v. *NLRB*, 462 F.2d 8 (5th Cir. 1972)	10
Wilson & Sons Heating & Plumbing, Inc. v. *NLRB*, 971 F.2d 758 (D.C. Cir. 1992)	12, 13, 14

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*	11
§ 7, 29 U.S.C. 157	4
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4

Miscellaneous: Page

Committee on Pattern Jury Instructions, U.S. Fifth Circuit Judges Ass'n, *Pattern Jury Instructions—Criminal Cases* (1983) 11
U.S. Attorneys' Manual:
1984 8
1988 9

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1403

CEDAR VALLEY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-27a) is reported at 977 F.2d 1211. The decision and order of the National Labor Relations Board (Board) (Pet. App. 28a-33a), including the decision and recommended order of the administrative law judge (Pet. App. 34a-72a), is reported at 302 N.L.R.B. No. 128.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1992. Pet. App. 1a. A petition for rehearing was denied on November 27, 1992. Pet. App. 73a. The petition for a writ of certiorari was filed on

February 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Cedar Valley Corporation (Company) is a road construction contractor headquartered in Waterloo, Iowa. Pet. App. 3a. In April 1978, the Company was awarded a road paving contract in Davenport, Iowa, one of several municipalities collectively known as the Quad Cities. *Id.* at 3a, 43a. In the summer of 1978, the Company became a signatory to four "pre-hire" collective bargaining agreements, which had previously been negotiated, pursuant to Section 8(f) of the National Labor Relations Act (Act), 29 U.S.C. 158(f), by the Associated Contractors (a group of Quad Cities employers engaged in the construction industry) and four unions based in the Quad Cities. Pet. App. 3a, 43a-46a.[1] The Company did not become a member of Associated Contractors but signed these pre-hire agreements as a "me-too" employer, and it honored their terms in completing the 1978 project. *Id.* at 14a, 48a-50a.

Each of the four labor agreements contained a provision respecting successor agreements. The Laborers, Operating Engineers, and Teamsters contracts bound signatories to succeeding agreements unless

---

[1] Local 309 of the Laborers International Union of North America, AFL-CIO (Laborers); Local 544 of the Operative Plasterers and Cement Masons International Association, AFL-CIO (Cement Masons); Local 537 of the International Union of Operating Engineers, AFL-CIO (Operating Engineers); and Local 371 of the International Brotherhood of Teamsters, AFL-CIO (Teamsters) (collectively referred to as the Unions). Pet. App. 34a.

they timely exercised their right to revoke Associated Contractors' authority to so bind them, Pet. App. 43a-44a, 45a, 47a; the Cement Masons contract provided for automatic renewal absent timely notice by signatories of the intention to modify or terminate. *Id.* at 46a. The Company never exercised its contractual right to revoke Associated Contractors' authority to bind it to successor agreements with the Laborers, Operating Engineers, and Teamsters, nor did the Company ever exercise its contractual right to terminate the Cement Masons agreement. *Id.* at 44a, 45a-48a.

The dispute in this case arose during the summer of 1989, when the Company returned to Davenport under a contract to perform paving work on Interstate 280. The Operating Engineers, Laborers, and Teamsters had negotiated successor collective bargaining agreements with Associated Contractors, which were effective May 1, 1989. Pet. App. 44a, 45a. By operation of the automatic renewal provision, a successor Cement Masons contract had also become effective on May 1, 1989. *Id.* at 61a.

In May and June 1989, officials of the Operating Engineers, Laborers, and Cement Masons requested "pre-job" conferences with the Company pursuant to these agreements, but the Company refused to recognize the unions, and denied that it had any contractual relationship with them, because in 1984 employees in its Waterloo bargaining unit had voted to decertify sister locals of the Laborers and Cement Masons, and because in 1983 a sister local of the Operating Engineers had withdrawn a Board petition to represent the Company's Waterloo employees. Pet.

App. 54a-56a, 58a. After work had begun on the Interstate 280 project, a Teamsters official objected to the Company's refusal to honor the Teamsters agreement, but the Company ignored the protest and completed the project without hiring any employees represented by the Unions. *Id.* at 57a.

2. In June and September 1989, the Unions filed unfair labor practice charges with the Board. The Unions alleged that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by repudiating the 1989 collective agreements and by withdrawing recognition from them in connection with the Interstate 280 project. Pet. App. 36a.[2] The Board's General Counsel issued unfair labor practice complaints against the Company, and, after a hearing, an administrative law judge (ALJ) sustained the allegations of the complaints.

The ALJ observed that, under the Board's decision in *John Deklewa & Sons, Inc.*,[3] an employer who is a party to a pre-hire agreement authorized by Section 8(f) cannot unilaterally repudiate such an agreement during the contract term. Pet. App. 38a. The ALJ further noted that, under Board law,[4] if an employer,

---

[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

[3] 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge & Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988).

[4] The ALJ cited, *inter alia*, *Nordpal Corp.*, 297 N.L.R.B. 119 (1989); *W.B. Skinner, Inc.*, 283 N.L.R.B. 989 (1987); *IBEW*,

in becoming a signatory to a Section 8(f) contract, consents to be bound by successor agreements or by automatic renewals of the original agreement, it must honor such subsequent agreements until it has timely exercised a contractual right to terminate the agreement and to withdraw the delegation of bargaining authority given to the multiemployer association. *Id.* at 58a-59a.

Applying these principles, the ALJ held that the Company was bound by the 1989 successor collective bargaining agreements, since the Company, in the original agreements, consented to be bound by successor agreements negotiated by Associated Contractors and the Unions, and had never exercised its contractual right to terminate the agreements or to withdraw bargaining authority from Associated Contractors. Pet. App. 59a-60a. Accordingly, the ALJ recommended, *inter alia*, that the Board order the Company to cease and desist from refusing to adhere to the 1989 agreements, and to make whole any employee who may have suffered loss as a result of the Company's repudiation of those agreements. *Id.* at 62a-63a.

In reaching his decision, the ALJ rejected the Company's claim that, because the sister locals of three of the Unions had either been decertified by, or had disclaimed further interest in representing, the Company's Waterloo employees in 1983 and 1984, the Company had no legal obligation to honor the 1989 collective bargaining agreements. The ALJ found that

---

Local 532 (Brink Construction Co.), 291 N.L.R.B. 437 (1988); and *Reliable Electric Co.*, 286 N.L.R.B. 834 (1987).

the Waterloo locals represented only the Company's employees "employed at its jobsites in Waterloo," and that "the geographic jurisdiction of [the Waterloo locals] and the scope of their respective labor agreements [does] not extend into * * * the Quad Cities." Pet. App. 40a-41a. The ALJ therefore held that the Board proceedings involving the Waterloo locals did not legitimize the Company's conduct vis-a-vis the Quad Cities unions.[5] *Id.* at 58a.

The ALJ also rejected the Company's claim that, because some of the members of Associated Contractors withdrew bargaining authority from Associated Contractors prior to the effective date of the 1989 collective bargaining agreements, the Company was not bound by those agreements. The ALJ explained that "the fact that the number of employers who are members of the Association rises or falls or the fact that many members of the Association withhold bargaining authority from the Association is irrelevant." Pet. App. 60a.

The Board affirmed the ALJ's decision and adopted his recommended order. Pet. App. 29a.[6] In a

[5] The ALJ reasoned: "A decertification of Union X does not decertify Union Y. If grounds exist to repudiate a contract with Union A or grounds exist to justify a refusal to bargain with Union A it does not follow that an employer may repudiate a contract with Union B or refuse to bargain with Union B." Pet. App. 58a.

[6] In addition, the Board considered and rejected claims, which were not addressed by the ALJ, that the Company was not bound by the Operating Engineers, Laborers, and Teamsters agreements because it had lawfully terminated its contractual relationship with those unions prior to what the Company considered to be the effective dates of the respective

concurring opinion, Board Member Oviatt observed that, while the fragmentation of a multiemployer bargaining unit "might well be a reason not to require an employer to continue to honor its obligations under the multiemployer agreements," the Company had not relied on that ground when it refused to honor the agreements. *Id.* at 33a.

3. The court of appeals enforced the Board's order. The court rejected the Company's assertion that it was privileged to disregard its contracts with the Quad Cities unions because of the earlier decertification of the Waterloo unions. The court agreed with the Board that the Waterloo unions and the Quad Cities unions represented different bargaining units. Pet. App. 12a-13a. Therefore, the court concluded that "the viability and enforceability of the controlling agreements is in no way impaired by the decertification of the Waterloo unions." *Id.* at 16a.

The court also rejected the Company's argument that it was not required to honor the contracts because "Associated Contractors suffered a complete breakdown or disintegration" prior to May 1, 1989, the effective date of the successor agreements. Pet. App. 20a. The court found that substantial evidence supported the Board's "[i]mplicit" finding that Associated Contractors had not disintegrated or ceased to exist at the time the Company became bound by the successor agreements. *Id.* at 21a. The court acknowledged that "eleven of [the] thirteen member employers of the association withdrew their

successor agreements. Pet. App. 29a-31a. The court of appeals rejected these claims, *id.* at 18a-19a, and petitioner does not seek further review of them.

bargaining rights from Associated Contractors." *Ibid.* The court pointed out, however, that, subsequently, the Associated Contractors did negotiate successor agreements with the Quad Cities unions and thirteen employers, including the eleven who had withdrawn bargaining rights, signed an addendum thereto. *Id.* at 22a-23a. In those circumstances, the court could not "overturn the Board's finding that Associated Contractors remained, at all relevant times, a viable organization able to bind Cedar Valley." *Id.* at 23a.[7]

ARGUMENT

Petitioner contends (Pet. 7-8) that it was free to withdraw recognition from the Quad Cities unions and to disregard the terms of the collective agreements in connection with the Interstate 280 project because its employees "exercised their statutorily protected right not to be represented by * * * the Waterloo Unions" in 1984, and because the association lost power "to collectively bargain for its own members, let alone me-too signatories such as Petitioner." There is no merit to these contentions and they raise no issue warranting review by this Court.

1. Section 8(f) of the Act, 29 U.S.C. 158(f), permits an employer in the construction industry to recognize a union as the exclusive collective bargaining

[7] The court of appeals rejected the Company's further contentions that the Board unjustly applied its *Deklewa* decision retroactively in this case, and that the Board misinterpreted the original Teamsters agreement respecting the Company's future obligations. Pet. App. 19a-20a, 24a-27a. The Company does not seek further review of these rulings.

representative of its employees, prior to the hiring of any employees. *Building & Construction Trades Council* v. *Associated Builders & Contractors*, No. 91-261 (Mar. 8, 1993), slip op. 11; *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-266 (1983). To protect the free choice of employees, however, the final proviso of Section 8(f) permits employees, once hired, to utilize the Board's election process under Section 9(c) of the Act, 29 U.S.C. 159(c), if they wish to reject the bargaining representative recognized by the pre-hire agreement. See *NLRB* v. *Local Union No. 103, International Ass'n of Bridge & Iron Workers*, 434 U.S. 335, 345 (1978).

Here, a bargaining unit comprised of "employees at [petitioner's] facility in Waterloo," Pet. App. 12a, decided in 1984 not to retain the Waterloo Laborers and Cement Masons locals as their bargaining representatives. Petitioner contends that that decertification cut off any further contractual relationship between it and the Quad Cities unions. Petitioner argues (Pet. 11) that the Waterloo election should be deemed to have the effect of decertifying the Quad Cities unions because, according to petitioner, the Quad Cities unions represented "essentially the same employees" that rejected further representation by the Waterloo unions.[8] That factbound contention lacks merit.

Initially, petitioner's assertion that the employees who voted to decertify the unions in Waterloo were

---

[8] Petitioner does not explain how the 1984 election could possibly have affected the Quad Cities Teamsters and Operating Engineers, whose Waterloo sister locals were not decertified by a vote of the employees.

essentially the same employees represented by the Quad Cities unions is not based on any finding of the Board or the court of appeals. The ALJ found that the Quad Cities contracts permitted petitioner to hire only a limited number of employees from outside the geographic area represented by the Quad Cities unions and that petitioner complied with those requirements in staffing its pre-1984 Quad Cities jobs. Pet. App. 49a-50a, 51a-52a. And the court of appeals noted that workers from the Quad Cities area comprised "approximately one-half of the workforce" in petitioner's pre-1984 jobs in that area. *Id.* at 3a-4a.[9]

In any event, even if petitioner's workforce in the Quad Cities area were the same as its Waterloo workforce, the Waterloo employees could not be presumed to have rejected representation by the Quad Cities unions because they voted to decertify two Waterloo unions. As the court of appeals correctly noted, Pet. App. 12a, "the Waterloo units of the Teamsters, Cement Masons, Operating Engineers and Laborers are distinct and independent from their sister units in the Quad City area." None of the Quad Cities unions was party to the 1984 election in

---

[9] Pursuant to Section 8(f)(4), 29 U.S.C. 158(f)(4), a contract in the construction industry may establish a hiring hall arrangement that accords priority hiring rights to employees in the particular geographic area. The hiring hall, however, may not discriminate in favor of union members. See *Ward* v. *NLRB*, 462 F.2d 8, 9 n.1 (5th Cir. 1972). Petitioner's assertion (Pet. 12) that none of its Waterloo employees would be able to obtain employment through the Quad Cities unions' hiring halls is not based on any record evidence and is not borne out by its pre-1984 experience.

Waterloo. *Id.* at 41a. Therefore, the election result did not constitute a rejection by petitioner's employees of further representation by *those* unions. Nor is it a fair inference that employees who reject some unions reject all unions. A group of employees may well reject union representation in one geographic area and desire it in another, where, for example, contractual benefits may be better in one area than in another, local union representation may be more effective in one area than in another, or the competitive position of unionized versus non-unionized employers may provide more work for unionized employees in one area than in another. In sum, there is no basis in this record or in the policy of the Act to presume that decertification of the Waterloo unions effectively abrogated petitioner's relationship with the Quad Cities unions.

2. Petitioner also contends (Pet. 15-17) that the Associated Contractors lost the authority to bind the Company to the 1989 agreements negotiated by the Associated Contractors when all thirteen members of the Associated Contractors (including eleven who had previously withdrawn the right of the Associated Contractors to bargain on their behalf) entered into a separate agreement with the Unions as an addendum to the Associated Contractors contracts.[10] Petitioner

[10] The ALJ rejected petitioner's contention that Associated Contractors had fragmented to such an extent that it was no longer a viable entity, finding only that the number of contractors who maintained membership had fluctuated. Pet. App. 60a. The court of appeals agreed that Associated Contractors continued to be a viable multiemployer organization, albeit thirteen member employers had signed the sepa-

asserts that, because the addendum accorded the thirteen Associated Contractors members more favorable terms than the Associated Contractors contract accorded petitioner, it is unfair to hold petitioner to that contract.

No issue is presented on this record respecting a "me-too" employer's right to reject coverage under a contract negotiated by a multiemployer association that is less favorable than the terms the association has afforded its members. First, petitioner never objected to being bound by the 1989 Associated Contractors contracts on the Interstate 280 job because the more favorable terms of the addendum were not available to it; its objection was based solely on the erroneous claim that the Quad Cities unions covered by the contracts had been decertified as a result of an election held with regard to sister unions in another jurisdiction. See Pet. App. 33a, 54a-56a. Second, it is not clear that the more favorable provisions of the addendum would not have applied to petitioner. As the court of appeals noted, an Operating Engineers business agent testified that the "addendum served to modify the collective bargaining agreements of 1989 between the complaining unions and Associated Contractors (Tr. 542)." *Id.* at 22a; see also General Counsel's Exh. 53, at 7 (Teamsters adoption of addendum as part of existing Associated Contractors contract).

Contrary to petitioner's contention (Pet. 12-14), the decision of the court of appeals does not conflict with

---

rately negotiated addendum to the association-negotiated collective agreements. *Id.* at 21a-22a.

that of the D.C. Circuit in *Wilson & Sons Heating & Plumbing, Inc.* v. *NLRB*, 971 F.2d 758 (1992). The decision of the D.C. Circuit turned on the proper interpretation of the automatic renewal clause of the contract there. No such issue is presented here. In *Wilson* the Board found that "Wilson, which was bound by a letter of assent to a one-year master agreement between the union and an employer's association, was also bound for another year by an automatic renewal clause in the master agreement, even though the association had prevented automatic renewal as to itself by giving suitable notice and negotiating a new agreement." 971 F.2d at 759. The court of appeals disagreed. Based on the language of the clause, extrinsic evidence as to the parties' intent, and the anomaly that Wilson would be bound by a contract that no longer existed, the court concluded, as a matter of contract interpretation, that the automatic renewal clause did not bind Wilson in those circumstances. 971 F.2d at 760-761.[11]

Here, by contrast, there is no issue as to whether petitioner was bound by the renewal clauses of the Associated Contractors contracts. As the court of appeals noted, Pet. App. 6a, petitioner raised an issue of contract interpretation only as to the renewal clause of the Teamsters contract, and contrary to petitioner's suggestion (Pet. 13-14), the court of appeals conducted *de novo* review as required by *Litton*

[11] In so finding, the court noted that "[i]n contrast to the substantial deference accorded the Board's fact findings, policy decisions and choice of remedies," it gave the Board's interpretation of contracts no special deference, citing *Litton Financial Printing Div.* v. *NLRB*, 111 S. Ct. 2215 (1991). .

Financial Printing Div. v. *NLRB*, 111 S. Ct. 2215 (1991), see note 11, *supra*, and concluded that petitioner was bound by the Teamsters contract. Pet. App. 6a, 15a. Finally, it is far from clear that the more favorable terms of the addendum to the Associated Contractors contracts would not have applied to petitioner. See p. 12, *supra*. Accordingly, this case does not present the "anomaly" that troubled the *Wilson* court, 971 F.2d at 760-761, of holding a "me-too" employer bound to an agreement after the association members had secured a new, more favorable agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

APRIL 1993